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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BISMARCK,
Petitioner

v.

THEODORE GEORGE HULM AND TOM A. BRIGHAM,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

James P. Rausch
RAUSCH & RAUSCH
320 North Fourth Street
Bismarck, North Dakota 58501
(701) 223-8105
Counsel for the Petitioner, First Federal Savings and Loan Association of Bismarck

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Court of Appeals for the Eighth Circuit in this matter was erroneous and in conflict with the position taken by the Court of Appeals for the Ninth Circuit in that the decision below provides that for purposes of 11 U.S.C. §548, the date the transfer of the debtor's interest in property occurred at the time of the mortgage foreclosure sale rather than the date the mortgage was perfected under applicable state law?

2. Whether the Eighth Circuit Court of Appeals in this case erred when it refused to adopt the position taken by the Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals by holding that the bid of the mortgagee at a regularly conducted mortgage foreclosure sale is to be presumed the "reasonably equivalent value" of the debtor's interest in the property in the absence of fraud or collusion for purposes of the fraudulent transfer section of the Bankruptcy Code, rather then requiring the mortgagee to conduct an evidentiary hearing on the value of the property at the time of said sale which was the decision of the Court below?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, First Federal Savings and Loan Association of Bismarck, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on July 5, 1984.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eighth Circuit reversing the decision of the United States District Court for the District of North Dakota appears in the Appendix at A-1. The Decision of the United States District Court for the District of North

Dakota affirming the decision of the United States Bankruptcy Court for the District of North Dakota appears in the Appendix at A-10. The Decision of the United States Bankruptcy Court appears in the Appendix at A-19.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 5, 1984, which appears in the Appendix at A-1 et seq. This petition for a writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Fraudulent Transfers and Obligations, 11 U.S.C. §548

(a) The trustee may avoid any tranfer of an interest of the debtor, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor—

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer occurred or such obligation was incurred, indebted; or

(2)(A) received less than reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business, or was about to engage in business or a transaction, for which any property remaining with the debtor was unreasonably small capital; or

(iii) intended to incur, or believe that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured. . . . .

(d)(1) For the purpose of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition.

(2) In this section—

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor; . . . .

N.D.C.C. §28-23-04 Sale of real property — notice of sale.

"Before any real property or interest therein take on excution shall be sold, the officer making such sale must give public notice of the time and place thereof, in the manner following:

1. If a newspaper is printed in the county where the real property to be sold is situated, such notice must be given by advertisement in some newspaper printed in such county once a week for three successive weeks, the last publication to be at least ten days prior to the making of such sale; . . . ."

N.D.C.C. §28-23-05 Where sale of real property made.

"All sales of real property, or any interest therein, under execution, must be held at the courthouse, if there is one in the county in which such real property is situated. . . ."

N.D.C.C. §28-24-02 Payment on and period of redemption.

"The judgment debtor or redemptioner may redeem the property from the purchaser within one year (six months in redemptions under subsection 1 of section 32-19.1-04) after the sale on paying the purchaser the amount of his purchase with interest thereon at the same rate as is provided in the original instrument upon which the judgment is based, which rate shall not exceed the maximum rate provided . . . together with the amount of any insurance premiums, assessments or taxes which the purchaser may have paid thereon. . . ."

N.D.C.C. §28-24-11 Debtor entitled to rents during redemption period.

"The debtor under an execution or foreclosure sale of his property shall be entitled to the possession, rents, use, and benefit of the property sold from the date of such sale until the expiration of the period of redemption."

N.D.C.C. §32-19-09 Certificate of sale — deed and effect.

"Whenever any real property shall be sold under judgment of foreclosure pursuant to the provisions of this chapter, the officer or other person making the sale must give to the purchaser a certificate of sale as provided by section 28-23-11, and at the expiration of the time for the redemption of such property, if the same is not redeemed, the person or officer making the sale, or his successor in office, or other officer appointed by the court, must make to the purchaser, his heirs, or assigns, or to any person who has acquired the title of such purchaser by redemption or otherwise, a deed or deeds of such property. Such deed shall vest in the grantee all the right, title and interest of the mortgagor in and to the property sold, at the time the mortgage was executed, or subsequently acquired by him, and shall be a bar to all claim, right, or equity of redemption in or to the property by the parties to such action, their heirs and personal representatives, and also against all persons claiming under them, or any

of them, subsequent to the commencement of the action in which such judgment was rendered."

N.D.C.C. §32-19.1-04 Short Term Redemption

"All real property sold as provided in section 32-19-08 upon foreclosure of a mortgage executed pursuant to this chapter may be redeemed with the time period specified in this chapter and in such manner as is prescribed by chapter 28-24. The period of redemption under this chapter shall be as follows:

1. If the amount claimed due upon such mortgage at the date of the notice before foreclosure is more than sixty-six and two-thirds percent of the original indebtedness secured by the mortgage, the redemption period shall be six months.

2. In any other case, the redemption period shall be one year."

N.D.C.C. §35-03-01.2(2) Nature, extent and effect of lien.

"2. A mortgage is a lien upon the property mortgaged in the hands of everyone claiming under the mortgagor subsequently to its execution, except purchaser and encumbrancers in good faith without notice and for value."

N.D.C.C. §35-03-07 Record-Notice to Whom

"The record of a mortgage duly made operates as notice to all subsequent purchasers and encumbrancers."

STATEMENT OF THE CASE

The Petitioner, First Federal Savings and Loan Association of Bismarck is a federally chartered savings and loan institution engaged in the business of making real estate loans for the purchase or improvement of real property. First Federal conducts its activities with respect to the making of such loans in accordance with both state and federal law. Such loans are secured by real estate mortgage instruments which are executed by the borrowers at the time of the loan transaction.

In November of 1978 Theodore G. Hulm, one of the respondents herein, and one Linda Heikes obtained a loan from First Federal in the sum of $61,000.00[1] The mortgagors signed the applicable mortgage form giving First Federal security for the repayment of this debt. The mortgage was duly recorded in the office of the Burleigh County Register of Deeds, which was the county in which the land was located. Said mortgage was recorded on November 29, 1978.[2]

Mr. Hulm and Ms. Heikes defaulted in the payments due under the terms of the note and mortgage they executed in this transaction. First Federal commenced its judicial mortgage foreclosure action and secured a judgment of foreclosure from the Burleigh County District Court on February 4, 1982. At the mortgage foreclosure sale which was conducted by the Burleigh County Sheriff on March 4, 1982, First Federal submitted its bid for the property in the sum of $64,443.64, which sum represented the amount of the judgment awarded by the court for the unpaid mortgage balance, costs of the ac-

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1. Ms. Heikes did not file a petition in bankruptcy and her interest in the property terminated upon the expiration of the period of redemption.

2. The date the mortgage was recorded has never been contested by any party.

tion and interest accrued to the date of sale.[3]

Mr. Hulm and Ms. Heikes retained possession of the property during the following period of redemption. The mortgagors failed to redeem the property from the effects of the foreclosure sale and the period of redemption expired in the latter part of June of 1982. On July 9, 1982, the Sheriff's Deed conveying title to the property was issued to First Federal.[4] Several weeks after the issuance and recording of the Sheriff's Deed, Mr. Hulm filed his petition in bankruptcy seeking relief under a Chapter 13 reorganization.

When Theodore Hulm filed his petition in bankruptcy, he still had possession of the property as he did not vacate voluntarily.[5] First Federal commenced an adversary action in the bankruptcy court seeking relief from the automatic stay provisions imposed so to be allowed to evict Mr. Hulm from the property, which had constituted his residence. It was in this proceeding that Mr. Hulm and the trustee in bankruptcy, Mr. Brigham, raised the argument that the foreclosure process and the resulting sale was a fraudulent transfer pursuant to 11 U.S.C. §548. They suggested that since the bid of First Federal for the property in the sum of $64,443.00 was less than the market value of the property, the bid was consequently not for the "reasonably equivalent value" thereof and was hence a fraudulent transfer."

The Honorable Harold O. Bullis, then Judge of the United States Bankruptcy Court for the District of North Dakota, did not hold any evidentiary hearing to deter-

3. It is conceded that the actual market value of the property foreclosed exceeded the mortgage balance but the actual value of the property has never been determined.

4. The issuance of the Sheriff's Deed was delayed due to a temporary restraining order obtained by Ms. Heikes in State District Court in a separate action.

5. First Federal had obtained a judgment of eviction from the Burleigh County Court immediately before Mr. Hulm had filed his petition in bankruptcy.

mine the actual market value of the property or of the debtor's interest therein. Instead, he treated the matter as presented basically a question of law which he disposed of in favor of First Federal. Recognizing the need to harmonize state mortgage foreclosure law with the bankruptcy laws of the United States, Judge Bullis held that the bid of the mortgagee at a mortgage foreclosure sale that resulted from a judicial foreclosure action, which appears to have been regularly conducted shall be deemed and presumed to be reasonably equivalent for purposes of 11 U.S.C. §548 in the absence of any showing of fraud or collusion.[6]

Judge Bullis specifically noted that the mortgagors were afforded protection by virtue of their statutory right of redemption which they failed to avail themselves of.[7]

Mr. Hulm and the trustee both effected an appeal to the United States District Court for the District of North Dakota. It was in this proceeding that First Federal raised the argument that for purposes of 11 U.S.C. §548, the "transfer" of the debtor's interest took place when the mortgage was perfected under North Dakota law, which date was far beyond the one-year reach-back period given the trustee in said section. The Honorable Bruce M. Van Sickle, Judge of the United States District Court, affirmed the decision of the Bankruptcy Court. However, in his decision Judge Van Sickle specifically found that the date of the transfer discussed in 11 U.S.C. §548 was the date of the foreclosure sale and not the date the mortgage lien was perfected under state law. Judge Van Sickle refused further to adopt the presumption promulgated in *In re Madrid* (supra) which had persuaded the Bankruptcy Court. Instead, Judge Van Sickle went outside the

6. In so holding, Judge Bullis adopted the majority position of the Bankruptcy Appellate Panel of the Ninth Circuit set forth in *In re Madrid*, 21 B.R. 424 (Bank. App. 9th Cir., 1982).

7. Under Section 28-24-02 N.D.C.C., the mortgagor can redeem by paying to the purchaser at the sale the amount of the purchase price, with interest accrued.

record of the case and decided that the purchase price of First Federal was reasonably equivalent value.[8]

The debtor and trustee took their appeal to the Eighth Circuit Court of Appeals. First Federal took a cross-appeal as it disagreed with the District Court's conclusions of law even though the result was favorable. In a decision written by Justice Fagg rendered on July 5, 1984, the Eighth Circuit reversed the decision of the District Court and remanded the case back to the Bankruptcy Court where an evidentiary hearing on the value of the debtor's interest in the property as it existed at the time of the foreclosure sale was ordered. In so ruling, the Eighth Circuit determined that the time of the transfer of the debtor's interest in the property for purposes of 11 U.S.C. §548 was at the time of the foreclosure sale which date was within the one-year reach-back period available to the trustee. The Eighth Circuit further rejected First Federal's suggestion that in the judicial mortgage foreclosure setting the Court adopt the presumption that the bid of the mortgagee at the foreclosure sale in a sum equal to its unpaid mortgage balance is to be presumed to be reasonably equivalent value of the debtor's interest in the property in the absence of any evidence of fraud or collusion.

This Petition for a Writ of Certiorari is being presented to allow this Court to resolve the conflicts which now exist between the circuit courts of appeals and to clarify the applicability of 11 U.S.C. §548 which is a bankruptcy provision on state mortgage foreclosure proceedings, which is a matter of substantial nationwide concern.

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8. Judge Van Sickle ascertained without the benefit of any formal evidentiary hearing the estimated value of the property from real estate tax statements, information relating to the sale of the property by First Federal to a third party and did make some conclusions about the discounting of the mortgage taken back by First Federal in that sale to support his conclusions.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts with the Decision of the Ninth Circuit Court of Appeals in that the Court Below has Determined that for Purposes of 11 U.S.C. §548, the Transfer of the Debtor's Interest in Property in a Mortgage Foreclosure Proceeding Occurred when the Mortgage Foreclosure Sale was Conducted Rather than at the Time the Mortgage was Perfected Under State Law.

When the trustee in bankruptcy attempts to utilize the avoidance powers conferred by 11 U.S.C. §548 to set aside transfers of the debtor's interest in property as being fraudulent transfers, the time that the transfer occurred is of utmost importance, for if the transfer occurred outside of the one-year period which allows the trustee to reach back under 11 U.S.C. §548(a), the transfer is immune from attack under this section.

11 U.S.C. §548 has its own provision contained in the body of the statute which provides when such a transfer of an interest is deemed to have occurred:

> "For the purposes of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition." 11 U.S.C. §548(d)(1)

In the case before this Court, the mortgage of Mr. Hulm and Ms. Heikes was executed in November of 1978 and recorded in the office of the Register of Deeds on the 29th day of November, 1978. It is the position of First Federal that this is the date discussed in §548(d)(1) and

is the date when the "transfer", if any, did occur.[9] By recording the mortgage, First Federal gave notice to the world of its interest in this property so that no person could obtain an interest in the property without notice of First Federal's mortgage lien interest. N.D.C.C. §35-03-07.

Utilizing the precise definition of when a transfer occurs as set forth in 11 U.S.C. §548(d)(1), it seems clear that the transfer in this particular case occurred when the mortgage was in fact recorded, which date would be beyond the one-year reach-back period provided the trustee. First Federal acquired a first mortgage lien on the property of Mr. Hulm and Ms. Heikes as of November 29, 1978. No subsequent encumbrancer could obtain a greater lien interest in the property and would be subordinate to the interests of First Federal. Any grantee of the mortgagor's title interest would take subject to the lien of First Federal and would take the property as encumbered. The grantee's interest would not be superior to the interest of the mortgagee so as to allow the grantee the right to merely ignore the existence of said lien.

The District Court and the Eighth Circuit Court of Appeals clearly misapplied 11 U.S.C. §548(d)(1) when they stated that Mr. Hulm had an interest which could be transferred and, hence, the date of the foreclosure sale must be the date when the last transfer occurred. First Federal never argued that Mr. Hulm had no interest in the property after the mortgage was recorded and the lien perfected so to preclude any conveyance of the same by him. What First Federal was arguing was that no transferee from Mr. Hulm, be it a grantee of a title interest or

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9. N.D.C.C. §35-03-01.2(2) provides that a mortgage is a lien upon the property mortgaged in the hands of everyone claiming under the mortgage subsequent to its execution, except purchasers and encumbrancers in good faith and without notice and for value.

an encumbrancer with a security interest, could obtain a superior interest to that of the perfected mortgage lien interest of First Federal.

The Court of Appeal for the Fifth Circuit handled a similar question which was decided on the code section that pre-existed 11 U.S.C. §548. In the case of *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d. 201 (5th Cir. 1980), the Court therein stated that the date of the foreclosure sale was the trigger date in determining when a transfer occurred for purposes of the applicable fraudulent transfer section of the bankruptcy code. This is clearly the position that the Court of Appeals for the Fifth Circuit adopted in its decision in this present case.

The decisions of the Fifth and Eighth Circuit Courts of Appeal, however, directly conflict with the decision of the Ninth Circuit Court of Appeals which directly involved the interpretation and application of 11 U.S.C. §548 to mortgage foreclosure settings. In the case of *In re Madrid,* 725 F.2d. 1197 (9th Cir. 1984), the Ninth Circuit stated:

> "We conclude that the foreclosure sale was not a transfer under §548(a), and do not decide whether the amount paid at the foreclosure was a reasonably equivalent value. For reasons that follow, we hold that the transfer of Madrid's property interest under §548(a)(2)(A) occurred at the time the second deed of trust was perfected under Nevada law. That transfer was carried out more than one year prior to the filing of the bankruptcy petition. Thus, the transfer was not voidable as a §548(a)(2)(A) fraudulent conveyance." Id. p: 1199.[10]

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10. In a concurring opinion, Circuit Judge Farris affirmed the decision of the majority, but stated that in his opinion there was no transfer for purposes of §548 where a deed of trust was given and later foreclosed on. Judge Farris stated that only those transfers where the debtor actually participated in are transfers which are subject to attack under §548.

The Court of Appeals for the Ninth Circuit applied applicable rule of law set forth in cases involving preferential transfers in arriving at the above-stated conclusion.

> "Our holding is in accord with cases decided under the preferential transfer section of the Bankruptcy Code (current §547; former §60a of the Act). The principle running throughout those cases is that enforcement of a valid lien within four months of bankruptcy petition filing cannot be struck down as a preferential transfer where the lien was perfected outside the four-month reach back period. No matter what enforcement mechanism was employed, transfer for purposes of the preferential transfer section occurred at the time of perfection of the lien, and not at the time of enforcement." *In re Madrid,* Id. p: 1201.[11]

The obvious concern to institutional lenders in this country as a result of the decision of the Fifth Circuit in *Durrett v. Washington Nat'l Ins. Co.* (Supra) and the Eighth Circuit Court of Appeals in this present case is obvious. Such decisions will have a chilling effect on the making of home loans in this country. The reason simply stated is that under the decision of the Courts of Appeals for the Fifth and Eighth Circuit, a mortgagor can attack the foreclosure sale within one year from the date of the sale by merely filing his petition in bankruptcy and having the trustee go after the property or the lender under the fraudulent transfer theory of 11 U.S.C. §548. This may occur even though the mortgagor has been paying faithfully on this mortgage for ten or twenty years but only has recently fallen onto hard times. When the loan was taken and the mortgage perfected, the lender was obviously satisfied with the borrowers credit record and

11. This quote is taken from the footnote of the Court which also contains citations to various Ninth Circuit cases dealing with preferential transfers.

repayment potential. If the lender is going to have to project the debtor's financial condition beyond the near future under fear of an eventual attack by a trustee in bankruptcy of a sheriff's foreclosure sale which may not occur for many years subsequent to the mortgage execution, that lender simply is not going to be an anxious to lend that money to the borrower as compared to situations where the lender can rely upon the borrower's present financial situation in making the loan.

A further concern to the lender such as First Federal is that every deed to real property it acquires under a judicial foreclosure action is rendered defective until such time as the trustee no longer is able by virtue of a statute of limitations to attack the sale under 11 U.S.C. §548. Hence, what the lender and title examiners always considered to be good title will now be defective title and the lender will be unable to pass marketable title to a prospective purchaser. This impairment of title of a lender's property acquired under a foreclosure action certainly could not have been the intent of Congress when it enacted the fraudulent conveyance section of the Bankruptcy Code.

Therefore, due to the enormous adverse impact the decision of the Fifth and Eighth Circuit will have on First Federal Savings and Loan of Bismarck and all lenders similarly situated nationwide, and in light of the conflict which now exists between the circuit courts as demonstrated herein, it appears necessary and imperative that this Court grant this Petition to address the issue raised herein and resolve the discrepancy of legal interpretations that now exist among the circuit courts of appeal.

II. The Eighth Circuit Court of Appeals Erred when it Refused to Adopt the Rule of Law Promulgated by the Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals Which Rule of Law Provides that the Bid of the Mortgagee at a Regularly Conducted Mortgage Foreclosure Sale Would be Deemed to be Reasonably

Equivalent Value for the Debtor's Interest in the Property for Purposes of 11 U.S.C. §548 in the Absence of Fraud or Collusion. Furthermore, the Requirement Imposed by the Decision of the Court Below that the Mortgagee Conduct an Evidentiary Hearing at the Time of the Foreclosure Sale and the Suggestion that the Mortgagee be Required to Purchase the Property at said Sale for an Amount Exceeding its Mortgage Balance is Contrary to the Purposes of State Mortgage Foreclosure Law and Renders such State Foreclosure Laws Ineffective as a Remedy to a Secured Lender.

To appreciate fully the adverse ramification of the decision of the Court below as it pertains to the foreclosure of deeds of trust or real estate mortgages by a secured lender, it is important to briefly discuss the manner and method of mortgage foreclosures and the purposes of such foreclosure actions. As this case arises out of a North Dakota mortgage foreclosure action, North Dakota law will be discussed.[12]

In North Dakota, the security instrument which secures the payment of a real estate loan is called a mortgage. In North Dakota, the only way a lender can foreclose a mortgage is by judicial action.[13] The court in such an action is to enter judgment for the lender in an amount which was due the lender on the mortgage at the time of the judgment, together with costs of the action and said court shall order the sale of the premises for such price as is necessary to pay the amount adjudged to be due.[14]

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12. The Petitioner assumes that judicial foreclosure procedures in other states would be comparable.

13. Only those mortgages executed to secure debts due the state owned Bank of North Dakota and those to the Board of University and School Lands may be foreclosed by advertisement. §35-22-01, N.D.C.C.

14. N.D.C.C. §32-19-06

Prior to the sale, there must be published in a newspaper in the county where the land is located a notice of sale, which publication occurs once a week for three successive weeks.[15] The actual sale is held at the courthouse in the county where the land is located.[16]

Because the mortgagor retains the right to possession and the right to redeem from the effects of the sale, such foreclosure sales draw little interest from the general public. Generally, the judgment creditor/mortgagee is the only party that attends the sale.[17] Since the purpose of the sale is to sell the property in an amount sufficient to satisfy the judgment, the mortgagee will purchase the property by bidding in the amount of the judgment, with interest accrued to the date of the sale.

The sheriff or other office conducting the sale will then issue to the purchaser a Certificate of Sale which merely identifies the purchaser and the amount of the purchase price. If a redemption is not made by the mortgagor or any other redemptioner, the holder of the Certificate of Sale is entitled to a deed.[18]

As noted above, the mortgagor is afforded a period of time after the sale to redeem from the sale. During this period of redemption he is entitled to the use, possession and rents derived from the property.[19] Generally, the mortgagor tries to effect a sale of the property during this time period so he can redeem by paying the holder of the Certificate of Sale the amount of the purchase price, together with interest, insurance premiums paid the purchaser, as well as taxes and assessments levied on the property and paid by the purchaser.[20]

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15. N.D.C.C. §28-23-04
16. N.D.C.C. §28-23-05
17. The right of redemption even under mortgages executed under the Short Term Mortgage Redemption Act can be as long as one year. N.D.C.C. §28-24-02 and §32-19.1-04.
18. N.D.C.C. §32-19-09
19. N.D.C.C. §28-24-11.
20. N.D.C.C. §28-24-02.

In this particular case, First Federal followed all of the statutory procedural requirements and purchased the property for the amount of its judgment so to satisfy the same. It did not bid any more than the amount of the judgment as that bid would have been redundant. Further, any higher bid or purchase price on the part of First Federal would have been unfair to the mortgagor as it would have required the mortgagor to pay more to effect a redemption than that which was actually owed on the mortgage debt.

Mr. Hulm and his trustee in bankruptcy have attacked this sale as being a fraudulent conveyance on the theory that since the property was worth more than the purchase price of First Federal, the purchase price was not reasonably equivalent value. The debtor and trustee are seeking to set aside the sale or require First Federal to pay the difference between the mortgage balance and the property's actual value.[21] The Eighth Circuit Court of Appeals, in a strict and narrow construction of 11 U.S.C. §548, stated that the purchase of the property at the foreclosure sale must be for the reasonably equivalent value, but failed to define what reasonably equivalent value was.[22]

The Fifth Circuit Court of Appeals, in applying the predecessor to 11 U.S.C. §548 devised a rule of law to the effect that any purchase of property of the debtor where the purchase price was less than seventy percent of the actual value would be presumed not to be for the reasonably equivalent value. *Durrett v. Washington Nat'l Ins. Co.*, 621 V.2d (5th Cir. 1980).

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21. Mr. Hulm did not file his petition in bankruptcy until after the Sheriff's Deed issued to First Federal after the expiration of the mortgagor's period of redemption. The trustee and debtor are relying upon the reach-back provision of 11 U.S.C. §548(a)(2)(A) to attack the sale.

22. Justice Fagg in his decision did intimate that reasonably equivalent value will probably be related to the actual value of the property.

Justice Fagg in writing for the Court below did not specifically mention the *Durrett* case but obviously adopted the rational espoused therein. The Eighth Circuit suggests by obvious implication that whenever a foreclosure sale is held, even if no bankruptcy is pending, an evidentiary hearing be held to determine if the bid is reasonably equivalent value. Thus, the Eighth Circuit Court of Appeals suggests that the bankruptcy laws of this country and specifically 11 U.S.C. §548 must be considered by the mortgagee when foreclosing real estate mortgages even where no bankruptcy is pending. The clear ramifications of the Eighth Circuit's decision in this case is to require an evidentiary hearing in every forclosure action brought by a lender. Such a requirement is judicially imposed and is not required by state foreclosure law.

The United States Bankruptcy Court that was presented this present controversy observed how such a holding totally conflicts with state foreclosure law. The Bankruptcy Court felt that a "per se" rule of law was necessary to exempt mortgage lenders from the broad scope of 11 U.S.C. §548. In rendering its decision, the Bankruptcy Court specifically adopted the rational and holding ably set forth in the bankruptcy matter of *In re Madrid*, 21 B.R. 424 (Bank. App. 9th Cir., 1982).[23]

The Bankruptcy Appellate Panel for the Ninth Circuit specifically rejected the *Durrett* ruling as not applicable in judicial foreclosure settings:

> "We decline to follow *Durrett's* 70% fair market value rule for the reason that a regularly conducted sale, open to all creditors, is itself a safeguard against the evils of private transfers to relatives or favorites. . . . If we consider the question of price ad-

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23. This is the same case which was eventually heard by the Ninth Circuit Court of Appeals and heretofore cited as 725 F.2d. 1197 (9th Cir. 1984) where the Court rule that the date of the transfer for purposes of 11 U.S.C. §548 was the date the mortgage or deed of trust was perfected under state law.

> equacy in the context of foreclosure law we find, not surprisingly, that mere inadequacy will not upset a foreclosure sale. *Golden v. Tomiyasu*, 79 Nev. 503, 387 P. 2d. 989 (1963). There must be in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price. . . . The law of foreclosure should be harmonized with the law of fraudulent conveyances. Compatible results can be obtained by construing the reasonably equivalent value requirement of Code §548(a)(2) to mean the same as the consideration received at a non-collusive and regularly conducted foreclosure sale. Thus, in the absence of defects, such foreclosure withstands avoidance as a fraudulent conveyance." *In re Madrid*, 9 BCD 256, 257, 258 (Also cited at 21 B.R. 424 supra).

The decision of the Court below establishes precedent in the states within the Eighth Circuit and no doubt will be relied upon by the bankruptcy courts in other jurisdictions throughout the country. The forced application of 11 U.S.C. §548 in the manner suggested by both the Fifth and Eight Circuits will cause chaos and havoc in the area of real estate lending and mortgage foreclosure procedures. Those decisions, if followed, will render state mortgage foreclosure laws invalid. No longer will a lender/mortgagee be safe to purchase at a foreclosure sale by submitting its bid in the amount of the judgment, which is now the procedure in North Dakota as required by law. The mortgagee will be obligated to ignore state foreclosure law and must bid the market value of the property, apparently tendering the surplus payment to the court for payment to the creditors of the mortgagor. This certainly will cause pecuniary harm to the mortgagee and will also be detrimental to the mortgagor. As noted above, the mortgagor will now have to pay a much larger sum of money to effect a redemption due to the mortgagee's compliance with the decision of the Eighth

Circuit than he would have had to pay if the mortgagee merely complied with state foreclosure law. Such a situation cannot be tolerated.

Therefore, in light of the far reaching ramifications of the decision of the Court below as it adversely affects state mortgage foreclosure procedures and the rights of both lenders and mortgagors under such mortgages, and in consideration of the conflict that now exists between the various courts of appeals, this Court is respectfully encouraged to grant this Petition and address the issues raised herein to resolve the situation mortgage lenders and non-bankruptcy mortgagors now find themselves in.

CONCLUSION

For the reasons state herein, writ of certiorari should be issued to review the judgment and opinion of the Eighth Circuit Court of Appeals. It is submitted that such a writ is necessary in this case due to the conflict that now exists among the various circuit courts of appeal as to the issues raised herein and in light of the seriousness and magnitude such decision of the Court below will have on secured lenders in the State of North Dakota and in the United States where such secured lending practices are customary.

Respectfully submitted,

James P. Rausch
RAUSCH & RAUSCH
Attorneys at Law
320 North Fourth Street
P. O. Box 1413
Bismarck, North Dakota 58502-1413
(701) 223-8105
Counsel for the Petitioner,
First Federal Savings and Loan
Association of Bismarck

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

In Re:	:	
	:	
Theodore George Hulm, a/k/a Ted Hulm, *Debtor*	:	No. 83-2060
	:	
First Federal Savings & Loan Association of Bismarck, Inc., *Appellee,*	:	
	:	
vs	:	
	:	
Theodore George Hulm, a/k/a Ted Hulm, *Appellant.*	:	
	:	
* * * * * * *	:	
	:	
First Federal Savings & Loan Association of Bismarck, Inc., *Appellee,*	:	
	:	
vs	:	
	:	
Theodore G. Hulm, a/k/a Ted Hulm, *Appellant.*	:	
	:	
	:	
In Re:	:	
	:	
Theodore George Hulm, a/k/a Ted Hulm, *Debtor*	:	No. 83-2085
	:	
First Federal Savings & Loan Association of Bismarck, Inc., *Appellant,*	:	
	:	
vs	:	
	:	
Theodore George Hulm, a/k/a Ted Hulm, *Appellee.*	:	
	:	
* * * * * * *	:	
	:	
First Federal Savings & Loan Association of Bismarck, Inc., *Appellant,*	:	
	:	
vs	:	

Theodore G. Hulm, a/k/a Ted Hulm,
Appellee.

In Re:

Theodore George Hulm, a/k/a Ted Hulm,
Debtor

No. 83-2143

First Federal Savings & Loan Association of Bismarck, Inc.,
Appellee,

vs

Theodore George Hulm, a/k/a Ted Hulm,
Appellant.

* * * * * * *

First Federal Savings & Loan Association of Bismarck, Inc.,
Appellee,

vs

Tom A. Brigham, Trustee,
Appellant.

Submitted: February 17, 1984
Filed: July 5, 1984

Before BRIGHT, ARNOLD, and FAGG, Circuit Judges.

FAGG, *Circuit Judge.*

The questions in this case are (1) whether a foreclosure of a mortgage pursuant to the North Dakota statutory scheme, involving a judicial foreclosure sale and issuance of a sheriff's deed following expiration of a redemption period, effects a transfer of an interest of the debtor in property within the meaning of 11 U.S.C.

§548(a), which permits the bankruptcy trustee to avoid a fraudulent transfer of an interest of the debtor in property, and, if so, (2) whether absent improprieties the price received for property at a judicial foreclosure sale provides a reasonably equivalent value for the transfer of the debtor's interest under 11 U.S.C. §548(a)(2)(A) as a matter of law. We hold that foreclosure of a mortgage pursuant to the North Dakota statutory scheme effects a transfer of an interest of the debtor in property, and that on remand the bankruptcy court must conduct an evidentiary hearing to determine whether the sale price at the judicial foreclosure sale which occurred in this case provided a reasonably equivalent value in exchange for the transfer of the debtor's interest.

George Hulm and Linda Heikes granted a mortgage on residential property to First Federal Savings & Loan Association of Bismarck on November 24, 1978, to secure a note for $61,000. Hulm and Heikes failed to make payments as required, and on November 12, 1981, a notice of intention to foreclose was served. A complaint commencing the foreclosure action was served on December 31, 1981, a default judgment foreclosing the mortgage was entered on February 4, 1982, and the house was sold at a judicial foreclosure sale on March 4, 1982. First Federal purchased the property at the foreclosure sale for $64,443.64, an amount which represented the unpaid balance of the note, accrued interest, and statutory costs awarded in the foreclosure action. On July 9, 1982, following expiration of the statutory period for redemption, a sheriff's deed was issued to First Federal, giving it title to the property. Hulm filed his petition in bankruptcy on July 26, 1982.

First Federal filed this adversary action seeking a determination that the property was not a part of Hulm's bankruptcy estate and a modification of the automatic stay so that First Federal could proceed with eviction proceedings under state law. Heikes had already been evicted. The trustee contended that the mortgage fore-

closure should be set aside because it was a preferential transfer under 11 U.S.C. §547 or a fraudulent transfer under 11 U.S.C. §548. The bankruptcy court rejected both contentions, but only the fraudulent transfer question is presented to us on appeal.

The principal rules governing fraudulent transfers are found in 11 U.S.C. §548, which provides in pertinent part:

> (a) The trustee may avoid any transfer of any interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor—
>
> * * *
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation
>
> * * *

There appears to have been no real dispute concerning whether Hulm fell within the insolvency requirement of section 548(a)(2)(E)(i). Similarly, there is no doubt that the judicial foreclosure sale, the expiration of the redemption period, and issuance of the sheriff's deed all occurred within one year before Hulm's bankruptcy petition was filed. As a consequence, we are not asked to decide in this appeal precisely when during the foreclosure process the transfer took place. We are concerned with the remaining elements of a fraudulent transfer, i.e., whether the mortgage foreclosure procedures in this case effected a transfer of an interest of the debtor in

property and whether a reasonably equivalent value was received in exchange for the transfer.

The bankruptcy court held that absent a showing of fraud or collusion the sale price at a judicial foreclosure sale is a reasonably equivalent value for the property transferred, and that since there was no such showing in the present case, any transfer resulting from the foreclosure sale could not be set aside under 11 U.S.C. §548(a). On appeal the district court held that sale of the property at the foreclosure sale was a transfer within the meaning of 11 U.S.C. §548(a), and then, after discussing the facts involved, concluded that the sale price was a reasonably equivalent value. At that time, however, no evidentiary hearing had been conducted concerning the issue of reasonably equivalent value. Although the bankruptcy court and the district court focused on the total price received for the property at the sale, it is more accurate to consider the value received for Hulm's interest, which comprised less than all rights in the property. This point is not of practical significance, however, since examination of the adequacy of the total sale price necessarily subsumes the issue of the adequacy of the value received for Hulm's interest.

On appeal Hulm and the trustee contend that the district court erred in its determination that the sale price at the foreclosure sale was a reasonably equivalent value under 11 U.S.C. §548(a)(2)(A). In its cross-appeal First Federal contends that the transfer of Hulm's interest occurred when the mortgage was recorded and perfected under state law on November 29, 1978, more than one year before Hulm's bankruptcy petition was filed. First Federal also contends that actual market value is irrelevent because absent a showing of fraud or collusion the sale price at a judicial foreclosure sale is a reasonably equivalent value for the property transferred as a matter of law.

The question of whether the judicial foreclosure of a mortgage effects a transfer within the meaning of section 548(a) is a question of federal law. *See McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70 (1945). Thus, to aid in determining whether the foreclosure of the mortgage was a transfer of an interest of the debtor in property, we turn to the definition of transfer found in 11 U.S.C. §101(41): " '[T]ransfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest." If at the time of the mortgage foreclosure Hulm held an interest in the property, the language of section 101(41) clearly establishes that the mortgage foreclosure procedure in this case effected a transfer. Section 101(41) expressly includes involuntary transfers, and neither section 101(41) nor section 548(a) indicates that to fall within their terms the transfer had to be made by Hulm himself.

The term "interest of the debtor in property" is not defined in the Bankruptcy Code, however, and thus we look to state law to determine whether the debtor had an interest in property. *See Butner v. United States*, 440 U.S. 48, 55 (1979); *Johnson v. First National Bank of Montevideo*, 719 F.2d 270, 273 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1015 (1984). We have no difficulty in concluding that under North Dakota law Hulm had an interest in the property at the time of its sale, and at least until expiration of the redemption period. The mortgage held by First Federal was only a defeasible conveyance giving it the right to satisfy Hulm's unpaid debt from the property. *See Pioneer Credit Co. v. Latendresse*, 286 N.W. 2d 445, 447 (N.D. 1979). As a mortgagee, First Federal did not have a title interest in the property. *Aure v. Mackoff*, 93 N.W. 2d 807, 811 (N.D. 1958). Hulm remained the legal owner of the property until foreclosure, and his interest was alienable. *Knowlton v. Coye*, 37 N.W. 2d 343, 347 (N.D. 1949). Hulm's interest

also included the right to possession of the property until the end of the redemption period, *see* N.D. Cent. Code §28-24-11, and the right to the excess of the value of the property over First Federal's mortgage, *see* N.D. Cent. Code §32-19-10. At the foreclosure sale Hulm's interest was transferred, subject to redemption. Hulm's equity of redemption was likewise an interest in the mortgaged property which could be conveyed. *See Robar v. Ellingson*, 301 N.W. 2d 653, 657 (N.D. 1981). Issuance of the sheriff's deed terminated Hulm's interest in the property. *See* N.D. Cent. Code §32-19-09.

In support of its contention that the transfer of Hulm's interest in the property occurred when the mortgage was perfected, First Federal cites 11 U.S.C. §548(d)(1) which provides:

> For the purposes of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition.

This section only determines when a transfer is deemed to have occurred, not whether a certain occurrence is a transfer of an interest of the debtor in property. *See McKenzie v. Irving Trust Co., supra*, 323 U.S. at 369-370. Hence, the transfer of an interest accomplished by Hulm's granting the mortgage to First Federal occurred, by the terms of section 548(d)(1), when the mortgage was perfected. But as we have already noted, Hulm retained an interest in the property after the mortgage was perfected. Section 548(d)(1) is in no way inconsistent with our conclusion that separate and distinct interests in property may be transferred at different times. It

is our view that foreclosure of the mortgage under the North Dakota statutory scheme effected a transfer of the interest retained by Hulm after he granted a mortgage to First Federal.

We now turn to the issue of whether a reasonably equivalent value was received for Hulm's interest in property which was transferred as a result of the mortgage foreclosure. The bankruptcy court relied on *In re Madrid*, 21 B.R. 424, 427 (Bankr. 9th Cir. 1982), and concluded that absent a showing of fraud or collusion the sale price at a judicial foreclosure sale is a reasonably equivalent value for the property transferred as a matter of law. The bankruptcy court did not hold an evidentiary hearing in order to develop a record from which a determination could be made whether the price bid at the foreclosure sale provided a reasonably equivalent value for Hulm's interest in the property. In support of the bankruptcy court's holding, First Federal has cited only the bankruptcy appellate panel's decision in *In re Madrid, supra*, 21 B.R. at 427. While the Ninth Circuit affirmed that decision, *In re Madrid*, 725 F.2d 1197 (9th Cir. 1984), in doing so the court expressly declined to adopt the reasoning of the bankruptcy appellate panel. *Id.* at 1199.

We disagree with the approach taken by the bankruptcy court. We do not believe that the sale price at a regularly conducted foreclosure sale, although absent fraud or collusion, can automatically be deemed to provide a reasonably equivalent value in exchange for the interest of the debtor transferred within the meaning of section 548(a). In our view, the question of whether the sale price provided a reasonably equivalent value cannot be answered without an evidentiary hearing. Accordingly, we vacate the judgment of the district court and remand to the bankruptcy court for an evidentiary hearing and for a determination of whether the sale price at the foreclosure sale provided a reasonably equivalent

value in exchange for the transfer of Hulm's interest in the property.

We are aware of expressed concern that the result we have reached will affect the strategies of purchasers at judicial foreclosure sales. *See In re Madrid*, 725 F.2d 1197, 1202 (9th Cir. 1984); *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547, 550 (5th Cir. 1981) (Clark, J., dissenting), *cert. denied*, 454 U.S. 1164 (1982). The Bankruptcy Code provisions are clear, however, and direct the result we have reached. Hence, policy considerations cannot affect the outcome in this case, but must be addressed, if at all, by Congress.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA SOUTHWESTERN DIVISION

In Re: Theodore George Hulm, a/k/a Ted Hulm, *Debtor*	
First Federal Savings & Loan Association of Bismarck, Inc., *Plaintiff/Appellee,* *-vs-* Theodore George Hulm, a/k/a Ted Hulm, *Defendant/Appellant.*	A1-83-70
First Federal Savings & Loan Association of Bismarck, Inc., *Plaintiff/Appellee,* *-vs-* Tom A. Brigham, Trustee, *Defendant/Appellant.*	A1-83-69

ORDER

Appellants object to the decision of the Bankruptcy court on the ground that the court applied an invalid rule of law in holding that absent a showing of fraud or collusion, the sale price at a judicial foreclosure sale is a reasonably equivalent value for the property transferred. Since both appellants—a coowner of the property in-

volved in the foreclosure and his trustee in bankruptcy—raise identical issues concerning the sale of the same property, their appeals will be joined for purposes of this decision.

The appellee raises two additional issues: whether the transfer of the property to a third person moots the fraudulent conveyance claim; and whether the sale of the property at a foreclosure sale constitutes a fraudulent conveyance under 11 U.S.C. §548. Although these issues are not raised on a cross-appeal, they offer additional grounds for affirmance and have been responded to in reply briefs.

The facts surrounding this controversy are as follows. On November 24, 1978, the debtors George Hulm and Linda Heikes mortgaged their Bismarck home to First Federal to secure a note of $61,000. Hulm and Heikes defaulted in payments under the note and mortgage. A summons and complaint in foreclosure was served 31 December, 1981, and default judgment foreclosing the mortgage was entered 4 February 1982. Thereafter, a sheriff's sale was held on March 4, 1982. First Federal bought the property for the amount of its account balance at $64,443.64. The period of redemption expired 30 June 1982.[1] A stay of proceedings was secured by Linda Heikes from the Burleigh County District Court, which delayed issuance of the Sheriff's deed to First Federal until 9 July 1982.

Hulm filed his petition for bankruptcy on July 26, 1982. First Federal then brought an adversary proceeding against Hulm and the bankruptcy trustee seeking a judgment terminating the automatic stay of the defendant's eviction proceedings against Hulm, a declaration that the property was not an asset of the bankruptcy estate and that neither the trustee nor the debtor

1. The mortgage apparently contained the language "the parties agree that the provisions of the short-term mortgage redemption act shall govern this mortgage." *See*, N.D.C.C. §32-19.1.

had any interest in the property. The debtor and trustee argued that they had an interest in the property because the foreclosure sale should be set aside as either a preferential or fraudulent conveyance under 11 U.C.S. §§547 & 548 respectively. The Bankruptcy Court and parties treated this "defense" as a counterclaim or separate adversary proceeding even though no counterclaim or action had been filed as normally is done for fraudulent conveyance claims.

On December 23, 1982, the bankruptcy court ruled that neither the debtor nor the trustee had any interest in the property and lifted the automatic stay to permit First Federal to evict the debtor from the premises. The court ruled as a matter of law that the price at a judicial foreclosure sale is a reasonably equivalent value for the property transferred, absent a showing of fraud or collusion.

First Federal repossessed the property on January 7, 1983, and sold it the same day to a third party for $95,000.[2] The debtor and trustee submit that the property is worth in excess of this amount and submit that the Burleigh County records indicate that the property was assessed at $110,571 in 1982 for tax purposes and that an appraiser assessed the market value at $120,000. First Federal contends that the debtor's inability to sell the house, despite his efforts, indicates that the property was worth less than this amount.

I. Does the conveyance of the real estate to a third party moot the motion to set to aside the conveyance between the debtor/mortgagor and the mortgagee?

First Federal argues that the assertion of fraudulent conveyance is moot because the property is now beyond

2. The actual terms of the sale included $10,000 down, $85,000 financed by the seller, the seller to repair a damaged door, clean out the garage where deer had been butchered, and clean out a dog house on the premises. Otherwise the premises were sold "as is."

the reach of the court, First Federal having conveyed it to a bond fide third party purchaser. First Federal also contends that the appellants could have prevented this from happening simply by requesting a stay pending appeal, and because they failed to do so, they should not be heard to complain now that the property is beyond the court's jurisdiction.

This court disagrees. While First Federal may not be able to return the property, 11 U.C.S. §550 allows the trustee to recover the value of the property from the initial (sic) transferee when the transfer is voided under §548. *See also,* 37 Am. Jur. 2d *Fraudulent Conveyances* §157 (1968); 37 C.J.S. *Fraudulent Conveyances* §444 (1943). Thus, while the court may not reach the property, it may allow recovery against the transferee, First Federal, if it determines that the property was fraudulently conveyed at the foreclosure sale. The fact that the appellants could have prevented the conveyance to the third parties by obtaining a stay does not excuse the transferee from liability if indeed it were a party to a fraudulent conveyance.

II. Does the sale of the property at the foreclosure sale constitute a "transfer" within the meaning of 11 U.S.C. §548(d)(1)?

The Bankruptcy judge found that the foreclosure sale constituted a transfer within the definition of 11 U.S.C. §548(d)(1). First Federal argues that the judge erred in this conclusion and hence no transfer occurred (sic) within one year of the filing of the bankruptcy petition as required by §548. That section defines "transfer" as follows:

> For purposes of this section, a transfer is made when such transfer becomes so far perfected that a bond fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is

> superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition.

First Federal argues that upon "the giving of the mortgage by Mr. Hulm and Ms. Heikes to First Federal and the recording of the same on November 29, 1978, First Federal's interest became perfected so that no other purchaser or encumbrancer who would acquire an interest subsequent to that date could achieve an interest in the property superior to that of First Federal. From this, and the definition of transfer, they assert it follows that the foreclosure sale is not a transfer.

This conclusion is a non sequitur. The fact that the mortgage to First Federal was a valid transfer does not preclude any subsequent transfers. Clearly, the mortgagor still retains a interest in the property which he can transfer. Here the mortgagor conveyed this interest at the foreclosure sale to First Federal. This interest was so perfected that if Hulm tried to sell his home after the foreclosure sale, the other purchaser would not acquire a superior claim to that interest. Clearly, then, the transfer that occurred (sic) at the sale constitutes a transfer within the meaning §548.

First Federal cites a Bankruptcy court opinion, *In re Alsop*, 5 CBC 2d 797 (D. Alaska 1981), *affirmed*, No. A-81-545 (Judge Fitzergerald, D. Alaska, May 5, 1982), where the court held the "transfer" which occurs at a foreclosure sale must be deemed to be at the time of the recording of the original (sic) deed of trust. Under Alaska law, the interest of the purchaser at a foreclosure is perfected at the time of the recording. However, First Federal cites to this court no North Dakota law to this effect, nor is this court aware of any. Further, the *Alsop* decision is questionable even under Alaskan law, since the fact the transfer in question took place at the fore-

closure sale. That is, the purchaser had no title to the property prior to the foreclosure sale and a fortiori could not have had a claim superior to another's at that time. While Alaska law holds that the scope of the ultimate purchaser's interest is perfected at the time of the original trust deed, this does not change the fact that the transfer occurred (sic) at the foreclosure sale.

The appellee's citation of *Sprague v. Vogt*, 164 F.2d 312 (8th Cir 1947), is of no relevance since that case did not address the transfer issue but determined that the purchaser at an execution sale more than two years prior to the filing of bankruptcy petition has a valid title against creditors unless the bankrupt's failure to redeem was a result of the purchaser's fraud.

Therefore, the court agrees with the Bankruptcy Court's finding that the foreclosure sale constituted a transfer under 11 U.S.C. §548.

III. Was the sale price at the judicial foreclosure sale a reasonably equivalent value?

Appellents (sic) claim that the sale price at the foreclosure sale was not a "reasonably equivalent value" (REV) and hence may be set aside as a fraudulent transfer under 11 U.S.C. §548(a)(2)(A).[3] They argue that the Bankruptcy court erred in holding that the sale price at a foreclosure sale is irrebutably deemed to be REV in the absence of fraud or collusion. In support of

3. Title 11 U.S.C. §548 (a) provides in pertinent part:

> The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor—
>
> * * *
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation;
>
> * * *

The appellee apparently concedes that the debtor qualifies under §548(a)(2)(B)

this argument, appellants cite *Durrett v. Washington*, 621 F.2d 201 (5th Cir. 1980), where the court set aside a foreclosure sale of property that sold for 57.7% of its market value. The court in *Durret* (sic) supported this result by citing a case where a *private* sale had been set aside and by stating it could find no cases where the sale of real property for less than 50% of its market value was not set aside as a fraudulent conveyance.

The Bankruptcy court rejected the *Durrett* holding and instead followed the holding of a Bankruptcy Appellate Panel, *In re Madrid*, 21 B.R. 424 (Bankr. 9th Cir. 1982) (2-1 decision). The *Madrid* court held that the sale price received at a non-collusive and regularly conducted foreclosure sale is REV. The *Madrid* court interpreted *Durret* (sic) as advancing a rule that all sales for less than 70% of market value should be set aside. It rejected this rule, stating:

> We decline to follow Durrett's 70% fair market value rule for the reason that a regularly conducted sale, open to all bidders and all creditors, is itself a safeguard against the evils of private transfers to relatives and favorites.

21 B.R. at 426-27.

The *Madrid* court went on to discuss the question whether the sale price at a foreclosure sale is REV. The court stated that this sale price at a non-collusive and regularly conducted foreclosure sale must be considered to be REV in order to "harmonize" fraudulent conveyance laws with foreclosure law. 21 B.R. at 427. Under foreclosure law mere inadequacy of consideration, however, gross, is not sufficient to set aside a sale. Rather, "there must be in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the adequacy of price." *Oller v1 (sic) Sonoma County Land Title Co.*, 290 P.2d 880, 882 (Cal. App. 1955); *quoted in In re Madrid*, 21 B.R. at 427.

Although the *Madrid* court did not say why it considered such disharmony to be undesirable, presumably it believed that bad consequences would ensue from a rule that allows foreclosure sales to be set aside for inadequate consideration. Such a rule would "cast a cloud" on the real estate title by creating uncertainty as to the validity of the title. In turn, this uncertainty would then drive down the sale price still further and possibly affect the willingness of banks to make mortgage loans.

The dissent in *Madrid*, Bankruptcy Judge Volinn, argued that the majority's rule was too mechanical, and that grossly inadequate consideration would be a basis for setting aside a foreclosure sale. This court agrees that in some circumstances grossly inadequate consideration.[4] would be sufficient to set aside a sale because in this court's view such consideration would constitute evidence of oppression or unfairness.

Here, however, the evidence does not indicate that the sale price was grossly inadequate consideration. The market value figure $120,000, is questionable because, despite the debtor's efforts to sell the house at this price, he could not do so. Further, the price at foreclosure, $64,443, must be viewed in the light of the devaluation which results from the encumbrance of the statutory right of redemption. Lastly, the claim that the Bank has received a windfall of $20,000 after expenses ignores costs that the Bank absorbed in evicting the debtor and clearing title in Bankruptcy Court as well the fact that the bank only received $10,000 in cash when it resold for $95,000 and the fact that mortgage paper for $95,000 must be significantly discounted to reflect its market value.

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4. As already noted 11 U.S.C. §548 (a) does not strictly require that the value received by "market value" but "reasonably equivalent value" (REV). REV will, of course, be assessed by reference to market value, but REV may be within a reasonable range below or above market value.

Appellants do not claim the fraud, unfairness or oppression occurred except insofar as the sale price was inadequate. Therefore, I conclude that the Bankruptcy Court correctly refused to set this sale aside as a fraudulent conveyance.

The judgment of the Bankruptcy Court is affirmed.

Bismarck, North Dakota, this 18 day of July, 1983.

/s/ Bruce M. Van Sickle

Bruce M. Van Sickle, Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NORTH DAKOTA

In Re: Theodore George Hulm, a/k/a Ted Hulm, *Debtor.*	Bankruptcy No. 82-05409
First Federal Savings & Loan Association of Bismarck, a corporation, *Plaintiff,* *-vs-* Theodore George Hulm, a/k/a Ted Hulm, and Tom A. Brigham, Trustee, *Defendant.*	Adversary No. 82-7319

MEMORANDUM DECISION AND ORDER

Counsel for Plaintiff:

James P. Rausch, Esq., Bismarck, ND.
Richard G. Carver, Esq., Bismarck, ND (Hulm).
Alan Grindberg, Esq., Steele, ND (Trustee).

First Federal Savings and Loan Association of Bismarck (FIRST FEDERAL) brought this adversary proceeding against the Debtor and the Bankruptcy Trustee seeking an order declaring that certain property is not an asset of the bankruptcy estate and that neither the Trustee nor the Debtor has any right, title or interest in the property. First Federal also seeks modification of the automatic stay of 11 U.S.C. §362(a) in order to evict the Debtor from the premises and a judgment against the Debtor for the reasonable value of rent.

The Trustee contends that the value of the property is greatly in excess of that paid by First Federal at a foreclosure sale, and that the transfer to First Federal

was preferential and fraudulent. He seeks to have the transfer set aside under 11 U.S.C. §547 and 11 U.S.C. §548. The Debtor also contends that he has equity in the property in question.

A preliminary hearing was held in Bismarck, North Dakota, on October 20, 1982, concerning First Federal's request for relief from the automatic stay. It was agreed at that hearing that no factual dispute existed concerning First Federal's claim to the property, and that the Court could make a determination from those facts whether a preferential or fraudulent transfer occurred. It was further agreed that if the Court should find that a preferential or fraudulent transfer occurred, a further hearing would be held concerning the value of the property. All parties have filed briefs in support of their positions.

The undisputed facts may be summarized as follows. The property in question, described as Lot One (1), Block Twenty-three (23), Southwood Terrace Second Addition to the City of Bismarck, was jointly owned by the Debtor and Linda Heikes. On November 24, 1978, Hulm and Heikes mortgaged the property to First Federal to secure a note of $61,000 dated the same day and bearing interest at 10 percent per annum.

Hulm and Heikes defaulted in payments due under the note and mortgage. On November 12, 1981, First Federal served a Notice of Intent to Foreclose its Mortgage on Hulm and Heikes, and on December 31, 1981, a Summons and Complaint seeking foreclosure of the mortgage was served. Neither Hulm nor Heikes responded to the Complaint, and on February 4, 1982, a default judgment foreclosing the mortgage was entered in the Burleigh County District Court. Pursuant to that judgment the property was sold by the Sheriff of Burleigh County, North Dakota, on March 4, 1982, to First Federal for $63,827.37 and a Sheriff's Certificate of Sale was issued. Hulm and Heikes had until June 30, 1982, to redeem the property from the purchaser. They failed

to redeem and on July 9, 1982, a Sheriff's Deed was issued to First Federal. Thereafter, on July 26, 1982, Hulm filed his Chapter 13 Petition in Bankruptcy.

The trustee alleges the property is worth approximately $125,000.00. First Federal disagrees with the valuation, but does agree that the property may be worth as much as $90,000.00.

The question for determination by the Court is whether a sale of property under a judgment of foreclosure entered in the District Court of Burleigh County, North Dakota, can be set aside as a preferential transfer under 11 U.S.C. §547 or as a fraudulent conveyance under 11 U.S.C. §548.

The sale cannot be set aside as a preferential transfer. One of the elements necessary to establish a preference under §547 is that the transfer was made on or within ninety (90) days before the date of filing of debtor's bankruptcy petition, unless the transferee was an insider and had reasonable cause to believe the debtor was insolvent at the time of the transfer, in which event the 90-day period is extended to one year. Here there was no allegation that First Federal was an insider and the foreclosure sale occurred on March 4, 1982, more than ninety (90) days before the filing of Debtor's Petition on July 26, 1982.

The question remains whether the transfer can be avoided as a fraudulent transfer under §548. In *In re Madrid*, 21 B.R. 424, (Bankr. App. 9th Cir. 1982), it was held that a non-judicial foreclosure of a deed of trust could not be upset under §548 merely because of inadequacy of consideration, but that there must also be a showing of fraud or collusion. The Court declined to follow the holding in *Durrett v. Washington Nat. Ins. Co.*, 621 F.2d 201 (5th Cir. 1980), where a non-judicial foreclosure sale was set aside as a fraudulent conveyance under §67(d) of the former Bankruptcy Act when the price paid was only 57.7% of the fair market value of the property. In setting aside that conveyance, the *Durrett*

Court determined, as a matter of law, that the price paid was not a fair equivalent value for the property. The Court also suggested that anything less than 70% of the fair market value would not be equivalent value. In rejecting the *Durrett* holding, the *Madrid* Court took the position that the law of foreclosure and the law of fraudulent conveyances must be harmonized and, in order to do that, the "reasonably equivalent value" requirements of §548(a)(2) must be construed to be the same as that received at a non-collusive and regularly conducted foreclosure sale.

This court agrees with the reasoning in *In re Madrid* and will find that absent a showing of fraud or collusion the sale price at a judicial foreclosure sale is a reasonably equivalent value for the property transferred. To hold otherwise would cast a cloud on all foreclosure sales for one year after the date of the foreclosure sale. The sale here was a judicial sale pursuant to a judgment of foreclosure entered in the State Courts of North Dakota. The Debtor was afforded an opportunity to redeem the property after the foreclosure sale in accordance with North Dakota law. His interest in the property terminated when he failed to avail himself of that right. In the absence of fraud or collusion that property interest should not be revived merely because he has now filed a Chapter 13 Petition.

For the reasons stated, it is ORDERED that neither the Debtor nor the Trustee have any interest in the property in question, and that the automatic stay of §362 be modified to permit First Federal to take steps to evict the Debtor from the premises.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated at Fargo, North Dakota, this 23rd day of December, 1982.

/s/ Harold O. Bullis

HAROLD O. BULLIS
U.S. BANKRUPTCY COURT

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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No. _____

OCT 11 1984
ALEXANDER L. STEVAS
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term 1984

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BISMARCK,

Petitioner,

-vs-

THEODORA GEORGE HULM AND TOM A. BRIGHAM,

Respondents.

RESPONDENT HULM'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RICHARD G. CARVER
VOGEL LAW FIRM
523 North Fourth Street
Bismarck, ND 58501
(701)-258-3475
Counsel for Respondent Hulm

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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1984

FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION OF BISMARCK,

Petitioner,

-vs-

THEODORE GEORGE HULM AND TOM A. BRIGHAM,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46.1 of the Rules of this Court, motion is hereby made that the Petitioner be allowed to proceed in forma pauperis.

Petitioner's affidavit is attached to this motion.

Respectfully submitted this 8th day of October, 1984.

Richard G. Carver
VINJE LAW FIRM
Attorney at Law
523 North 4th Street
Bismarck, ND 58501
(701)258-9475
Counsel for Respondent Hulm

No. _____

In The

SUPREME COURT OF THE UNITED STATES

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BISMARCK,

Petitioner,

-vs-

THEODORE GEORGE HULM AND TOM A. BRIGHAM,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Ted Hulm, aka Theodore George Hulm, being first duly sworn, being the respondent in the instant case, depose and say, in support of my Motion for Leave to Proceed In Forma Pauperis:

That because of my proverty, I am unable to stand the costs necessary for printing of the Brief in Opposition to the Application for Writ of Certiorari; that I am required to respond to the Application for Writ of Certiorari; that I am presently the debtor in a Chapter 13 petition filed with the United States Bankruptcy Court, in and for the District of North Dakota; that all of my disposable income has been required to fund the plan approved by that Court; and that I am in an impoverished condition.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the response to the Petition for a Writ of Certiorari are true.

1. Are you presently employed? YES

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. MISSOURI ELECTRIC, 527 MEMORIAL HIGHWAY, BISMARCK, ND 58501; $1760.00 MONTHLY.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received? N/A

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source? NO

a. If the answer is yes, described each source of income and state the amount received from each during the past twelve months. N/A

3. Do you own any cash or checking or savings account? YES

a. If the answer is yes, state the total value of the items owned. CHECKING ACCOUNT - $300.00-

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? YES

a. If the answer is yes, describe the property and state it approximate value. 1976 CHEVROLET 1/2 TON, 4-WHEEL PICKUP - $3000; 1976 28'X56' MOBILE HOME - $9000 EQUITY.

5. List the persons who are dependent on you for support and state your relationship to those persons. CANDY HULM; I AM HER FATHER.

I understand that a false statement or answer to any question in this affidavit will subject me to the penalties for perjury.

Theodore George Hulm
THEODORE GEORGE HULM

Subscribed and sworn to before me this 8th day of October, 1984.

Vicki J. Kunz
Vicki J. Kunz, Notary Public
Burleigh County, North Dakota
My Commission Expires: 11/2/85

-c-

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BISMARCK,

Petitioner,

-vs-

THEODORE GEORGE HULM AND TOM A. BRIGHAM,

Respondents.

RESPONDENT HULM'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUMMARY OF THE ARGUMENT

1. There exists no impermissible conflict between the circuits in the questions presented below. The differences in outcome between In re Madrid, 757 F.2d 1197 (Nev. 1984), and the case below are due exclusively to the difference in procedures authorized by state law. In re Madrid, (supra), turned upon the Nevada state laws on the foreclosure of a trust deed while the case below turned upon North Dakota state laws regarding the foreclosure of a mortgage and the rights remaining in the mortgagor subsequent to that foreclosure.

2. There is no error in the court below refusing to adopt the recommendations of the Ninth Circuit Bankruptcy Appellate Panel. The court below simply did what the Ninth Circuit did in In re Madrid, 757 F. 2d 1197 (Nev. 1984), in that it refused to adopt the recommendations of the Ninth Circuit Bankruptcy Panel. Certainly if the Ninth Circuit fails to adopt the position of its own bankruptcy panel, no fault can be found with the Eighth Circuit's declining to do the same.

ARGUMENT

1. There exists no impermissible conflict among the circuits.

The decision below does not conflict with the decision of the Ninth Circuit Court of Appeals. The case below is easily distinguishable from the Ninth Circuit Case by reason of a permissible conflict in State Law between the North Dakota Statutes and the Nevada Statutes. There exists between the Eighth and Ninth Circuits, no conflict in the decisions on the law except that which is required by State Law. In re Madrid, 757 F. 2d 1197 (Nev. 1984), was a case principally involving the foreclosure of the deed of trust and the ramifications surrounding that trust deed foreclosure. Foreclosure in that case was brought pursuant to Nevada State Law.[1]

The case in North Dakota involved a real estate mortgage as distinguished from a deed of trust which was foreclosed pursuant to the provisions of Chapter 32-19.1 of the N.D.C.C. That chapter provides for a period of redemption, which in this case was figured to be one year.[2]

Nevada Law which governs the foreclosure of deeds of trust provides for no period of redemption, and indeed the Nevada Supreme Court has ruled that there is no right of redemption in non-judicial foreclosures of deeds of trust.[3]

---

1 N.R.S. 107.080 (5) Every sale made under the provisions of this section and other sections of this chapter vests in the purchaser the title of the grantor without equity or right of redemption. The sale of a lease of a dwelling unit of a cooperative housing corporation vests in the purchaser title to the shares in the corporation which accompany the lease.

2 North Dakota Century Code Section 32-19.1-04 - Redemption period to commence upon filing of summons and complaint. In the event of foreclosure under this chapter, the period of redemption will commence to run at the time of the filing of the summons and complaint in the office of the clerk of the district court, unless it is determined by the district court that the mortgagee is not entitled to judgment, and in no event will the final date for redemption be earlier than sixty days after the sheriff's sale.

3 Rankins v. Administrator of Veterans' Affairs, 555 p. 2d 483, 92 Nev. 578 (Nev. 1976)

However, in North Dakota, not only is there a period of redemption, but that period of redemption is alienable and has been held to be so by North Dakota Supreme Court.[4]

Since under North Dakota law the equity of redemption is alienable, the transfer is not complete until the mortgagor is divested of that equity of redemption by the issuance of the Sheriff's Deed at the expiration of the period of redemption.[5]

Indeed, the debtor in North Dakota is entitled on execution or foreclosure of his property to the possession, rents, use, and benefits of the property during the running of the redemption period.[6]

Thus the Madrid case upon which the petitioners rely, is easily distinguishable from the case below. In re Madrid, (supra) relied upon the effect of a state law regarding the foreclosure of a deed of trust which provided for no period of redemption. The Court below relied upon North Dakota state law governing the foreclosure of a mortgage and its accompanying

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4 Mobar v. Ellingson, 301 N.W. 2d 653 (N.D. 1981)

5 North Dakota Century Code Section 32-19.1-02. Procedure where not covered by chapter. Where not inconsistent with the provisions of this chapter, the procedure for foreclosure set forth in the laws of the state of North Dakota as now enacted or hereinafter amended shall apply and be followed in any foreclosure hereunder.

North Dakota Century Code Section 32-19-09. Certificate of sale - Deed and effect. Wherever any real property shall be sold under judgment of foreclosure pursuant to the provisions of this chapter, the officer or other person making the sale must give to the purchaser a certificate of sale as provided by section 28-23-11, and at the expiration of the time for the redemption of such property, if the same is not redeemed, the person or officer making the sale, or his successor in officer, or other officer appointed by the court, must make to the purchaser, his heirs, or assigns, or to any person who has acquired the title of such purchaser by redemption or otherwise, a deed or deeds of such property. Such deed shall vest in the grantee all the right, title, and interest of the mortgagor in and to the property by the parties to such action, their heirs and personal representatives, and also against all person claiming under them, or any of them, subsequent to the commencement of the action in which such judgment was rendered.

6 North Dakota Century Code Section 28-24-11. Debtor entitled to rents during redemption period. The debtor under an execution or foreclosure sale of his property shall be entitled to the possession, rents, use, and benefit of the property sold from the date of such sale until the expiration of the period of redemption.

right of redemption which is, under North Dakota Law, alienable. Indeed, under North Dakota Law, the debtor is entitled to full possession of the property during the period of redemption. Thus, considering the factors considered by the Court below, and further considering applicable North Dakota Law, there was, in fact, no transfer until the issuance of the Sheriff's Deed.

This Court has said:

> "As to questions controlled by State Law, conflict among Federal Circuit Courts of Appeals is not of itself reason for granting a Writ of Certioari as Supreme Court of the United States, as conflict may be merely corollary to permissible differences of opinion in State Courts." Ruhlin v. New York Life Insurance Company, 304 U.S. 202;82 L. ed. 1290;58 S.Ct. 860, (1938.)

Therefore, there is no conflict between Madrid and the instant case. The differences in outcome of the cases is due to - what this Court has termed - a permissible difference in State Laws, not a difference in interpretation of Federal Statutes. In Nevada, there was no alienable interest after the foreclosure, while in North Dakota there remained, by virtue of State Law, an alienable interest until the date of the issuance of the Sheriff's Deed.

2. The refusal of the Court below to adopt the rule of the bankruptcy appellate panel in the Case of In re Madrid, 757 F.2d 1197 (Nev. 1984), was not error.

The Eighth Circuit Court of Appeals declined to adopt the rulings of the bankruptcy panel in the case of In re Madrid, 21 B.R. 424 (Bank.App.9th Cir.1982). There is, however, no conflict among the circuits whatsoever on this point, and any claim of conflict is purely spurious. The Court of Appeals for the Ninth Circuit also declined to adopt the recommendations of its own bankruptcy panel in In re Madrid.[7]

Therefore, if the Ninth Circuit declines to adopt the reasoning of its bankruptcy panel, the Eighth Circuit is certainly not in conflict with the Ninth Circuit when it also delines to adopt the recommendations of that panel.

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7 In re Madrid, 757 F. 2d 1197 (Nev. 1984)

Furthermore, the argument of First Federal seems to be that the State Law can be used to defeat the intent and purpose of the Congress in the enactment of the specific provisions of the United States Bankruptcy Code. Obviously, this approach would require the violation of the Supremacy Clause of the United States Constitution.

CONCLUSION

For these reasons, we pray that the Petition For Writ of Certiorari be denied as there exists no impermissible division in the Circuits on the question of Federal Law, and no error in the Eighth Circuit opinion.

Respectfully submitted this 8th day of October, 1984.

RICHARD G. CARVER
Attorney for Respondent Bulm
VINJE LAW FIRM
523 North 4th St.
Bismarck, ND 58501
(701) 258-9475

(3)

IN THE

OF THE UNITED STATES

October Term, 1983

[redacted] FEDERAL SAVINGS AND LOAN
[redacted] OF BISMARCK,

Petitioner

[redacted] AND TOM A. BRIGHAM, TRUSTEE

Respondents

RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Alan Grindberg
P. O. Box 9
Steele, North Dakota 58482
(701) 475-2229
Counsel for Respondent,
Tom A. Brigham

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— United States Supreme Cou-t

First Federal Savings and Loan of
Bismarck

v. No. _____

Theodore George Hulm and Tom A.
Brigham, Trustee

Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis

I, Tom A. Brigham, Trustee, being first duly sworn, depose and say that I am the respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to print its response, I state that because of poverty the estate is unable to pay the costs of said proceeding or to give security therefor; that I believe the estate is entitled to respond, and that the issues which it desire to present are in opposition to petition for a writ of certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

Respondant is Trustee of an estate in bankruptcy and appears in that capacity. There are no funds in the bankrupt estate for management.

Tom A. Brigham, Trustee

Subscribed and sworn to before me this 9th day of October, 1984.

Let the applicant proceed without printed brief in response.

Judge

ALAN GRINDBERG
ATTORNEY-AT-LAW
STEELE, N. DAK.

BEST AVAILABLE COPY

in the

United States Supreme Court

First Federal Savings and Loan of Bismarck

Petitioner,

No. _____

vs.

Theodore George Hulm and Tom A. Brigham, Trustee,

Respondents.

Motion For Leave To Proceed

In Forma Pauperis

Comes now the respondent Tom A. Brigham, Trustee, and moves the Court for an Order granting permission to proceed in this matter with typewritten response. This Motion is based on the files and records herein and on the attached affidavit.

Dated and signed this 9th day of October, 1984.

Alan Grindberg, Attorney for
Tom A. Brigham
P. O. Box 9
Steele, North Dakota 58482
(701) 475-2229

ALAN GRINDBERG
ATTORNEY-AT-LAW
STEELE, N. DAK.

IN THE

SUPREME COURT OF THE UNITED STATES

In re: First Federal Savings and Loan Association of Bismarck, Petitioner,	)	
-vs-	)	AFFIDAVIT OF MAILING
Theodore George Hulm and Tom A. Brigham, Respondents.	)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF KIDDER)

Jolene Dewitz, being first duly sworn on oath deposes and says that she is a citizen of the United States, over the age of eighteen years, and is not a party to the above entitled matter.

That on the 10th day of October, 1984, this affiant deposited in the mailing department of the United States Post Office at Steele, North Dakota, a true and correct copy of the following document filed in the above captioned action:

NOTICE OF APPEARANCE

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

That the copies of the above document were securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

Richard G. Carver
Vinje Law Firm
523 North Fourth Street
Bismarck, North Dakota 58501

James P. Rausch
Attorney at Law
P. O. Box 1413
Bismarck, North Dakota 58502

To the best of this affiant's knowledge, information and belief, such address as given above is the actual post office address of the party intended to be so served. That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Dated and signed this 10th day of October, 1984.

Jolene Dewitz

Subscribed and sworn to before me this 10th day of October, 1984.

Barbara Heaton
Barbara Heaton, Notary Public
Kidder County, North Dakota
My commission expires: 4-26-88

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Court of Appeals for the Eighth Circuit in this matter was erroneous and in conflict with the position taken by the Court of Appeals for the Ninth Circuit in that the decision below provides that for purposes of 11 U.S.C.§548, the date the transfer of the debtor's interest in property occurred at the time of the mortgage foreclosure sale rather than the date the mortgage was perfected under applicable state law?

2. Whether the Eighth Circuit Court of Appeals in this case erred when it refused to adopt the position taken by the Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals by holding that the bid of the mortgagee at a regularly conducted mortgage foreclosure sale is to be presumed the "reasonably equivalent value" of the debtor's interest in the property in the absence of fraud or collusion for purposes of the fraudulent transfer section of the Bankruptcy Code, rather then requiring the mortgagee to conduct an evidentiary hearing on the value of the property at the time of said sale which was the decision of the Court below?

Table of Authorities

Cases

In re Madrid, 725 F2d 1197
In re Madrid, 21 BR 424

Statutes
11 USC §548

Reports
H. R. Rep No 595, 95th Cong. 1st Session 177-179 (1977)

Opinions Below
The petition contains all of the opinions below as follows:

Eighth Circuit Court of Appeals	p. A- 1
District Court	p. A-11
Bankruptcy Court	p. A-19

REASONS FOR NOT GRANTING THE WRIT

I. The decision of the Eight Circuit in this case does not conflict with the Ninth Circuit's decision in In Re Madrid (725 F2d 1197)

To compare the two decisions here is the equivalent of comparing apples and oranges. The only similarity is that they both were determined under 11 USC §548. The Madrid decision was based on a deed of trust, the Hulm decision is based on a mortgage. The Madrid foreclosure was non-judicial, the Hulm decision was judicial. Madrid's rights were determined under Nevada law, Hulm under North Dakota law.

With these many difference, it is impossible to say that the Circuits are in conflict. It is necessary that the application of 11 USC §548 to a much more similar set of facts be decided before it is possible to say that the Circuits are in conflict.

Even if it were felt that a difference could be determined to exist here, the matter is not ripe for review by the Supreme Court. We have only had decisions from three Circuits, and any differences that may exist do not reach the level necessary to require review. The matter must be more clearly in conflict and that conflict should be more extensive before it is worthy of a review at this level.

In addition, the decision which should be reviewed is the incorrect decision and that is not the decision of the Eighth Circuit in this case. Section 548 transfer occurs when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but

if such transfer is not perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition." 11 USC §548(d)(1) Very clearly, a purchaser from Mr. Hulm, could have obtained an interest superior to that of First Federal Savings and Loan up to date of the sheriff's deed. Hulm, or a bona fide purchaser from him, could, up to the issuance of that deed, have obtained a clear fee title merely by paying off the mortgage. Such an interest would clearly be a superior interest in the property to any other interest. This, the Eighth Circuit was correct in its determination that the transfer occurred for purposes of 11 USC §548, when the sheriff's deed issued.

If the transaction sought to be avoided was the lien created by the mortgage, the argument of First Federal Savings and Loan would have some logic to it, but as it is, it is difficult to see how that position can be plausibly maintained.

II. The correct rule of law is not that a bid of a mortgagee at a foreclosure is reasonable equivalent value, per se.

A holding such as that made by the Ninth Circuit Bankruptcy Panel in In Re Madrid (21 BR 424) is contrary to logic and fairness and only serves to frustrate the basic principles and purposes behind the bankruptcy act. If we assume that a Savings and Loan Association was owed $60,000 on a house worth $120,000, is it equitable to the unsecured creditors that they take nothing while the secured association be allowed to take the property for its bid at the foreclosure sale and resell, not only recouping in full the money owed it, but also securing to itself an undeserved windfall of $60,000? Obviously the answer is no.

Having had a preferred position as a secured creditor from the outset, it should be sufficient for the Savings and Loan Association to be made whole, and equity should require that the proceeds from the debtor's equity in the property be used to reduce the losses they will be taking. Also, one of the basic purposes of bankruptcy is to provide for a fair and orderly dissolution of a bankrupt debtor.

", by permitting the trustee to avoid prebankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy. The protection thus afforded the debtor often enables him to work his way out of a difficult financial situation through cooperation with all his creditors. Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally. The operation of the preference section to deter "race of diligence of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference section--that of equality of distribution."
H.R. Rep. No. 595, 95th Cong., 1st Session 177-179 (1977).
(emphasis supplied)

Circumstances such as those hypothesized create a result in direct violation of these principles. While First Federal is paid off at 100 cents on the dollar, and acquires a huge unearned windfall, unsecured creditors will go without any payment. It is just this result that the Bankruptcy Code seeks to avoid.

If, in fact, a foreclosure sale were an "open-market" sale where all the forces of the housing market came into play, there

may be some justification in allowing such a sale to determine "reasonable equivalent value". However, as the Court is fully aware, at almost all foreclosure sales the only buyer present is the holder of the foreclosed mortgage lien. There is no competition. A price developed at such a sale has no relationship to the real value of the property.

First Federal argues that the decision in Hulm will, if allowed to stand, have a chilling effect on the real estate mortgage market. This is difficult to see, also. Mortgages are made, presumably, on the expectation that the lender will get its money back, together with an agreed rate of interest, not, hopefully, on the expectation that the lender will be the beneficiary of an unmerited windfall. Surely, the Savings and Loans Association can develop a procedure for handling these situations so that they are protected. The presence of this suit has not interfered with the prompt repossession and resale of the property in question.

If the Savings and Loan Associations are being hindered in loan management by 11 USC §548, it is to Congress that they should address their petition for relief. The mandate of the statute is clear and there has been no claim made that it is unconstitutional in any way.

SUMMARY

The petition should be rejected. There is no clear conflict between Circuits, and only three of the Circuits have thus far ruled on the matter. A review at this time would be premature.

The decision of the Eighth Circuit in this case is in accord with both the spirit and the letter of the law. A result such as that sought by the Savings and Loan would unjustly enrich a protected secured creditor at the expense of the unsecured creditor, a result clearly contrary to both that spirit of letter.

Therefore, the Trustee respectfully requests that the petition for writ of certiorari in this matter be denied.

Dated and signed this 9th day of October, 1984.

Alan Grindberg, Counsel for
Respondent, Tom A. Brigham
P. O. Box 9
Steele, North Dakota 58482
(701) 574-2229